In The

Supreme Court of the United States

October Term, 1944

No. ———

Roy K. O'Kelley, *Petitioner*,

v.

United States of America

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion Below

The opinion of the Court of Appeals was rendered on April 16, 1945, but is as yet unreported.

Jurisdiction

The opinion of the Court of Appeals was entered on April 16, 1945 (R. 29) and petition for a rehearing was denied on May 12, 1945 (R. 35). The jurisdiction of this Court is invoked under Section 237 and 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

Questions Presented

1

Are any of the fruits of an illegal entry and search of defendant's premises, or any information or contraband secured by exacting admissions from accused while admittedly under the coercive atmosphere of illegal arrest, admissible in evidence over his timely objection?

The Court below found "abundant" evidence in the record to show that O'Kelley was under illegal arrest at 1701 New Jersey Avenue, where the officers illegally secured the evidence covered in the first count of the indictment. Petitioner's claimed consent to that search was dismissed as having been "wrung" from him under compulsion (see opinion of Court below (R. pg. 31)). It further appears from the testimony on the motion to suppress, without contradiction, that the officers wrecked the New Jersey Avenue apartment (R. pg. 17). When, however, O'Kelley was removed from his apartment and transferred to the "reassuring" privacy of the narcotic squad room, further conversations were had with him which resulted in obtaining "the rest of his supply" (R. pgs. 14, 17), which formed the basis of the second count of the indictment. Just how, within the hour, and still under illegal arrest, and in custody of officers still flushed with the heat of their disregard of his personal rights, his admissions and acquiescence in their demands with respect to the "rest of his supply" became the product of his free and voluntary will, is totally unexplained. Where the conclusion is reached that O'Kelley was coerced on New Jersey Avenue, reason would dictate that unless some convincing evidence that the coercion is dispelled, a recuperative interval elapsed or some metamorphosis had occurred by virtue of which O'Kelley regained his free will, the atmosphere first obtaining on New Jersey Avenue continued. Now, completely under their control, and with

fresh recollection of their unrestrained conduct on New Jersey Avenue, it is small wonder that their intimation of a repetition on Providence Street (R. pg. —) produced the same results as their previous actual unlawful conduct.

Cf. Malinski v. The People of New York (Number 367, March 26, 1945) — U. S. —.
U. S. v. Baldocci, 42 Fed. (2d) 567.

Here, in addition, we have an arrest—unlawful at that—incidental to a search, not only of New Jersey Avenue, as the search went on before and after his arrest there, but continued also at Police Headquarters for information, and at Providence Street for confirmation of the information exacted there.

Cf. Henderson v. U. S., 12 Fed. (2d) 528.
Also see: Weeks v. United States, 232 U. S. 383, 58 L. Ed. 652. Frat. Order of Eagles v. U. S., 57 Fed. (2d) 93, 94.

The fact that this search of petitioner's premises and person and the coercively induced confessions or admissions produced contraband, does not validate or render the fruit admissible against the victim.

Byars v. U. S., 273 U. S. 28, 71 L. Ed. 520.
United States v. Setaro (D. C. Com.), 33 Fed. (2d) 134.

And the admissions, confessions and evidence obtained through and by virtue of their unlawful conduct cannot be used as evidence to convict petitioner.

Nusslein v. District of Columbia, 73 Apps. D. C. 85, 115 Fed. (2d) 690.

2

Does the mere possession of marihuana in two dwellings by the accused give rise to two distinct violations of Section 2593 of the Marihuana Tax Act of 1937?

Petitioner was charged with two violations of Section 2593 of Title 26 of the U. S. C. which provides as follows:

> (a) It shall be unlawful for *any person who is a transferee* required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

Section 2590 (a) provides as follows:

> (a) There shall be levied, collected, and paid upon *all transfers* of marihuana which are required by section 2591 to be carried out in pursuance of written order forms, taxes at the following rates:
>
> (1) Upon *each transfer* to any person who has paid the special tax and registered under sections 3230 and 3231, $100 per ounce of marihuana or fraction thereof.
>
> (2) Upon *each transfer* to any person who has not paid the special tax and registered under sections 3230 and 3231, $100 per ounce of marihuana or fraction thereof.

The petitioner, the record shows, had two apartments, one on New Jersey Avenue and one on Providence Street, both in the District of Columbia. In each apartment on March 26, 1944, he had a certain amount of marihuana. The indictment in this cause charges him with illegal possession (*sic*) a violation of section 2593 of the Marihuana Tax

Act of 1937 on March 26, 1944. The theory of the government in this case is that the marihuana at each apartment gave rise to two violations of the same statute. In its proof, however, the government does not attempt to show that petitioner "being a transferee" acquired the marihuana at different times but relies wholly upon the presumption contained in the statute.

Petitioner claims that the record only reveals evidence of one offense and that the lower court erred in affirming one count of his indictment and remanding the other count for a new trial. Possession, the basis from which guilt of the offense charged springs, is an abstract concept, continuous in nature and contra-distinguished from a single, separate act complete *uno ictu*. A somewhat similar charge was held by this court to constitute but one offense. In re Snow 120 U. S. 274, 30 L. Ed. 658. It is not the prerogative of the government to divide one crime into parts "A" and "B" merely by separating the quantities of the contraband, the possession of which marks the petitioner. The test to be applied in these type of cases was aptly put in Blockburger v. United States, 284 U. S. 299, 76 L. Ed. 306, at 308:

> "It is a continuous offense, having duration and not an offense consisting of an isolated act.
>
> "A distinction is laid down in adjudged cases and in textwriters between an offense continuous in character, like the one at bar, and a case where the statute is aimed at an offense that can be committed uno ictu. . ."

Here the gravamen of the offense is to obtain marihuana from a person without paying the tax; possession plus failure to exhibit an order form, being presumptive evidence thereof under the statute.

No attempt was made by the respondent to show that petitioner obtained each portion of the marihuana at a different time. Just how the presumption could also differentiate between the counts and supply to the jury the fact of

the separate acquisition of each portion of the contraband so as to justify double conviction is a legal anathema.

Compare:

3

The presumption in Section 2593 of the Marihuana Act of 1937, as amended, violates the Fifth Amendment, in that it is arbitrary and unreasonable as applied in the case at bar.

In the case at bar petitioner is charged with two violattion of the same section of the Marihuana Tax Act because the officers found he had marihuana in his possession in two dwelling houses in the District of Columbia. There is no difference in the proof required on one than of the other, except the place where the contraband was found. Your petitioner complains that the presumption of guilt arising from the possession of marihuana, and failure to exhibit an order form, bears no reasonable relationship to the fact to be inferred—i. e., that the petitioner acquired the marihuana from another person, and that in the case at bar, that he acquired the marihuana on New Jersey Avenue from some person at a different time from the occasion when he obtained that found on Providence Street. There is no testimony as to how or when any of the marihuana was acquired, or from whom. Your petitioner says that, as applied in the instant case, the presumption is unreasonable and arbitrary and violates the due process clause of the Fifth Amendment.

Bailey v. Alabama, 219 U. S. 219, 55 L. Ed. 191.

This Court announced the rule in Western A. R. Co. v. Henderson, 279 U. S. 639, 73 L. Ed. 884, at page 888:

> "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational con-

> nection between what is proved and what is to be inferred. . . . A statute creating a presumption that is arbitrary or that operates to deny fair opportunity to repel it, violates the due process clause of the 14th Amendment.* Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

Here the petitioner charged with two crimes, one of which has been reversed on his complaint, petitioner to avail himself of the opportunity to deny the second, must admit the first. The best governmental technique would be to charge every man twice under these circumstances, but let him avail himself of his constitutional rights on the first count, and he is impaled on the decoy count; if he confesses he only acquired both portions at one time he foregoes his constitutional rights by his judicial admission. This type of Pyrrhic victory cannot be the "fair opportunity" described in the Henderson case, supra. If it is, then the observations of Justice McReynolds in Casey v. U. S., 276 U. S. 413, 72 L. Ed. 632, at 635, would seem to be a correct interpretation of the advance of civilization.

CONCLUSION

For the foregoing reasons, it is submitted that the serious questions of law involved in this application are of sufficient importance to require exercise of this Court's jurisdiction by writ of certiorari.

Dated June —, 1945.

Respectfully submitted,

HENRY LINCOLN JOHNSON, JR.,
Attorney for Petitioner.

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* The due process clause under the Fifth Amendment is co-extensive with that under the 14th with reference to the restraint imposed. Cf. Heiner v. Donnan, 285 U. S. 312, 76 L. Ed. 772, at 779.